

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MAURICE JILES,

Petitioner,

vs.

BRIAN E. WILLIAMS, *et al.*,

Respondents.

2:13-cv-00422-GMN-CWH

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the Court is respondents' motion to dismiss. (ECF No. 6).

I. Procedural History

On May 3, 2010, petitioner was convicted, pursuant to a jury trial, of burglary and grand larceny. (Exhibit 33).¹ Petitioner was adjudicated a habitual criminal and was sentenced to two concurrent terms of 8-20 years in the Nevada Department of Corrections. (*Id.*) Petitioner appealed his conviction. (Exhibit 34). The Nevada Supreme Court affirmed petitioner's convictions in an order filed December 10, 2010. (Exhibit 47).

On March 3, 2011, petitioner filed a post-conviction habeas petition in the state district court. (Exhibit 50A). The state district court ordered a response to the petition, and a response was filed on May 11, 2011. (Exhibits 51 & 52). A hearing was held on May 17, 2011, and the petition was summarily denied by minute order. (Exhibit 11, at p. 12). It appears that the state district court failed to enter a written order disposing of the habeas petition.²

On September 24, 2011, petitioner filed a motion to modify or correct an illegal sentence. (Exhibit 53). The state district court denied the motion. (Exhibit 56). Petitioner appealed, and the

¹ The exhibits referenced in this order are found in the Court's record at ECF Nos. 7, 8, 10 and 13.

² See NRS 34.830 (setting forth requirements for an order disposing of habeas petition and a notice of entry of order).

1 Nevada Supreme Court affirmed the denial of the motion. (Exhibit 66). Remittitur issued on June 4,
2 2012. (Exhibit 68).

3 On March 12, 2013, this Court received petitioner's federal habeas corpus petition. (ECF
4 No. 1; ECF No. 4). The petition contains two grounds for relief: (1) petitioner claims that his due
5 process rights were violated because the presentence investigation report contained misleading
6 information about a 1986 shooting; and (2) petitioner claims that the State did not present certified
7 copies of his prior judgments of conviction in support of the habitual criminal adjudication. (ECF
8 No. 4, at pp. 3-5).

9 **II. Discussion**

10 In the motion to dismiss, respondents argued that the federal petition is untimely and that
11 Ground 2 of the petition is unexhausted. (ECF No. 6). Petitioner filed an opposition to the motion
12 to dismiss, in which he asserts that respondents failed to consider his post-conviction state habeas
13 petition when analyzing the timeliness of his federal petition. (ECF No. 11). Respondents filed a
14 reply, in which they acknowledge that, due to inadvertence, their motion to dismiss omitted the fact
15 that petitioner had filed a post-conviction habeas petition in state court on March 3, 2011. (ECF No.
16 12). Respondents concurrently filed an amended index of exhibits and Exhibit 50A, a copy of
17 petitioner's post-conviction habeas petition filed in state district court. (ECF No. 13). As a result of
18 the omission, and because of ambiguities regarding when the state habeas proceedings concluded,
19 respondents withdrew their argument that the federal petition is untimely. (ECF No. 12, at p. 3).

20 Respondents continue to assert the other argument made in the motion to dismiss – that
21 Ground 2 of the federal petition is unexhausted. (ECF No. 6, at pp. 4-5; ECF No. 12, at p. 3).

22 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has
23 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28
24 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his
25 claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S.
26 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains
27 unexhausted until the petitioner has given the highest available state court the opportunity to

1 consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,
2 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

3 A habeas petitioner must “present the state courts with the same claim he urges upon the
4 federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). To satisfy exhaustion, each of
5 petitioner’s claims must have been previously presented to the Nevada Supreme Court, with
6 references to a specific constitutional guarantee, as well as a statement of facts that entitle petitioner
7 to relief. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2002). The federal constitutional
8 implications of a claim, not just issues of state law, must have been raised in the state court to
9 achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404
10 U.S. at 276)). To achieve exhaustion, the state court must be “alerted to the fact that the prisoner [is]
11 asserting claims under the United States Constitution” and given the opportunity to correct alleged
12 violations of the prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala*
13 *v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a
14 simple and clear instruction to potential litigants: before you bring any claims to federal court, be
15 sure that you first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.
16 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).

17 In the instant case, respondents argue that Ground 2 of the federal habeas petition is
18 unexhausted. In Ground 2, petitioner alleges that the State did not present certified copies of his
19 prior judgments of conviction at sentencing in support of the habitual criminal adjudication. (ECF
20 No. 4, at p. 5). Petitioner did not present this claim to the Nevada Supreme Court on direct appeal in
21 his fast track statement. (Exhibit 43). Although petitioner asserts that he made the argument in his
22 post-conviction habeas petition filed in state district court, the state court record belies petitioner’s
23 assertion. Petitioner’s post-conviction state habeas petition contained only the following statement:

24 Consecutive sentence structure being challenged. PSI recommended
25 concurrent. Also, PSI info re: past felonies is erroneous in nature and
worked as a detriment at sentencing.

26 (Exhibit 50A, at p. 2). The post-conviction state habeas petition contains no claim that the State
27 failed to present certified copies of his prior judgments of conviction at sentencing in support of the

1 habitual criminal adjudication, as is claimed in Ground 2 of the federal habeas petition.
 2 Additionally, petitioner's motion to modify or correct illegal sentence did not assert a claim that the
 3 State failed to present certified copies of his prior judgments of conviction at sentencing in support
 4 of the habitual criminal adjudication. (Exhibit 53). Because petitioner appealed the denial of the
 5 motion to modify in pro per, no additional briefing was submitted to the Nevada Supreme Court,
 6 other than the motion to modify the sentence. Ground 2 of the federal habeas petition is
 7 unexhausted.

8 **III. Petitioner's Options Regarding Unexhausted Claim**

9 A federal court may not entertain a habeas petition unless the petitioner has exhausted
 10 available and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*,
 11 455 U.S. 509, 510 (1982). A "mixed" petition containing both exhausted and unexhausted claims is
 12 subject to dismissal. *Id.* In the instant case, the Court finds that Ground 2 of the federal habeas
 13 petition is unexhausted, while Ground 1 appears to be exhausted. Because the Court finds that the
 14 petition is a "mixed petition," containing both exhausted and unexhausted claims, petitioner has
 15 these options:

- 16 1. He may submit a sworn declaration voluntarily abandoning the unexhausted
 17 claim in his federal habeas petition, and proceed only on the exhausted claim;
 or
- 18 2. He may return to state court to exhaust his unexhausted claim, in which case
 19 his federal habeas petition will be denied without prejudice; or
- 20 3. He may file a motion asking this court to stay and abey his exhausted federal
 habeas claim while he returns to state court to exhaust his unexhausted claim.

21 *See Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v. Small*,
 22 315 F.3d 1063 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009).

23 Petitioner's failure to choose any of the three options listed above, or seek other appropriate
 24 relief from this Court, will result in his federal habeas petition being dismissed. Petitioner is advised
 25 to familiarize himself with the limitations periods for filing federal habeas petitions contained in 28
 26 U.S.C. § 2244(d), as those limitations periods may have a direct and substantial effect on whatever
 27 choice he makes regarding his petition.

1 **IV. Conclusion**

2 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss the petition (ECF No.
3 6) is **DENIED IN PART and GRANTED IN PART**, as follows:

4 1. Respondents' argument that the federal habeas petition is untimely is **DENIED**.

5 2. Respondents' argument that Ground 2 of the federal habeas petition is unexhausted is
6 **GRANTED**.

7 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** to either:

8 **(1)** inform this court in a sworn declaration that he wishes to formally and forever abandon the
9 unexhausted ground for relief in his federal habeas petition and proceed on the exhausted ground;

10 **OR (2)** inform this court in a sworn declaration that he wishes to dismiss this petition without
11 prejudice in order to return to state court to exhaust his unexhausted claim; **OR (3)** file a motion for
12 a stay and abeyance, asking this court to hold his exhausted claim in abeyance while he returns to
13 state court to exhaust his unexhausted claim. If petitioner chooses to file a motion for a stay and
14 abeyance, or seek other appropriate relief, respondents shall respond to such motion as provided in
15 Local Rule 7-2.

16 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted ground,
17 respondents shall have **thirty (30) days** from the date petitioner serves his declaration of
18 abandonment in which to file an answer to petitioner's remaining grounds for relief. The answer
19 shall contain all substantive and procedural arguments as to all surviving grounds of the petition, and
20 shall comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District
21 Courts.

22 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** following service
23 of respondents' answer in which to file a reply.

24 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within the time
25 permitted, this case may be dismissed.

26 Dated this 16th day of January 2014.

27 

Gloria M. Navarro, Chief Judge
United States District Judge